FILE COPY

Office-Supreme Court, U.S.
FILED
APR 20 1961
JAMES R. BROWNING, Clerk

Nos. 306, 307

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
RICHARD A. SOLOMON,
Attorney,
Department of Justice, Washington 25, D.C.

ROBERT W. GINNANE,
General Counsel,
CHARLIE H. JONES, JR.,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Questions presented	2
Statement	3
The Commission proceeding	5
The court proceeding	7
Summary of argument	8
Argument	14
I. The Commission correctly held that SP&S is so operated in conjunction and under a common management and control with Great Northern and Northern Pacific as to entitle the latter to protection under Section 15(4) of the Interstate Commerce Act from the short hauling which would result if SP&S were required to enter into through routes via Spokane with the Milwaukee	16
II. The Commission correctly held that, with exceptions, through routes do not exist over SP&S-Milwaukee via Spokane	33
III. The refusal of the SP&S to establish through routes and joint rates with the Milwaukee via Spokane does not result in discrimination against the Milwaukee, or in undue preference or prejudice between shippers or localities	45
IV. The Commission's finding that appellants had not satisfied the standards of Section 15(4) for the establishment of new through routes which would short-haul Northern Pacific and Great Northern is supported by the record	53
Lumber and Forest Products	56
Grain	62
Fresh Fruits and Vegetables	63
Furniture	64
Iron and Steel Grain Bins	65
Agricultural Implements	66
Livestock	67

Page

Conclusion 69
Appendix 70

CITATIONS

Court Cases:

Adams v. *Mills*, 286 U.S. 397 41
Board of Trade v. *United States*, 314 U.S. 534 ..... 12, 47, 62
Central R.R. Co. v. *United States*, 257 U.S. 247 47
Daugherty Lumber Co. v. *United States*, 141 F. Supp. 576 58
Denver & Rio Grande R. Co. v. *Union Pac. R. Co.*, 351 U.S. 321 ..... 9, 10, 20, 34, 35, 39, 40, 44, 46, 57, 61, 62
Ex Parte Public Bank, 278 U.S. 101 46
General Transportation Co. v. *United States*, 65 F. Supp. 981, affirmed, 329 U.S. 668 41
Great Northern Ry. Co. v. *United States*, 81 F. Supp. 921, affirmed, 336 U.S. 933 44
Great Northern Ry. Co. v. *United States*, 172 F. Supp. 705, vacated, 362 U.S. 939 51
Interstate Commerce Commission v. *Chicago R.I. & Pac. Ry.*, 218 U.S. 88 47
Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503 62
Louisville & Nashville R.R. v. *United States*, 242 U.S. 60 ..... 9, 12, 31, 46
M. & M. Transportation Co. v. *United States*, 128 F. Supp. 296, affirmed, 350 U.S. 857 51
Minneapolis Civic and Commerce Association v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 247 U.S. 490 33
New York v. *United States*, 331 U.S. 284 48
Pennsylvania R. Co. v. *United States*, 323 U.S. 588 ..... 13, 54
Rochester Telephone Corp. v. *United States*, 307 U.S. 125 21
Schaffer Transp. Co. v. *United States*, 355 U.S. 83 62
Texas & Pacific Ry. Co. v. *United States*, 289 U.S. 627 47
Thompson v. *United States*, 343 U.S. 549 ..... 9, 10, 11, 20, 33, 34, 39, 43
Transamerican Freight Lines v. *United States*, 51 F. Supp. 405 41
Union Pacific Railroad Co. v. *United States of America*, 132 F. Supp. 72 46

Court Cases—Continued

	Page
United States v. *Chicago Heights Trucking Co.*, 310 U.S. 344	12, 47–48
United States v. *Great Northern R. Co.*, 343 U.S. 562	33
United States v. *Hancock Truck Lines*, 324 U.S. 774	41
United States v. *Illinois Central R.R.*, 263 U.S. 515	48
United States v. *Missouri Pacific R. Co.*, 278 U.S. 269	9, 17, 20
United States v. *Tucker Truck Lines*, 334 U.S. 33	11, 40
United States v. *Union Pacific R. Co.*, 173 F. Supp. 397, affirmed, 362 U.S. 327	58
Virginian Railway v. *United States*, 272 U.S. 658	11, 42, 43, 51
Commission Reports:	
Absorption of Switching Charges, 157 I.C.C. 129	27
Adrian Grain Co. v. *Ann Arbor R. Co.*, 276 I.C.C. 331	34
Alabama T. & N.R. Corp. v. *Southern Ry. Co.*, 148 I.C.C. 708	24
Astoria, City of, v. *S.P. & S. Ry. Co.*, 38 I.C.C. 10	25
Blackshear Mfg. Co. v. *Atlantic Coast Line R.R. Co.*, 87 I.C.C. 654	22–23
Goddard, Joseph A., Realty Co. v. *N.Y.C. & St. L. R. Co.*, 229 I.C.C. 497	46
Helix Milling Co., Inc. v. *Great Northern Ry. Co.*, 287 I.C.C. 77	25
Hughes Creek Coal Co. v. *K. & M. Ry. Co.*, 29 I.C.C. 671	27
Independent Paper Stock Co. v. *Chicago & A.R. Co.*, 168 I.C.C. 404	28
Inland Empire Shippers League v. *Director General*, 59 I.C.C. 321	25
Manufacturers Ry. Co. v. *Ahnapee & Western Ry. Co.*, 172 I.C.C. 554	27
Pillsbury-Astoria Flour Mills Co. v. *Great Northern Ry. Co.*, 198 I.C.C. 642	25
Portland Chamber of Commerce v. *Oregon Railroad & Navigation Co.*, 19 I.C.C. 265	18, 25
Preston-Shaffer Milling Co. v. *Great Northern Ry. Co.*, 304 I.C.C. 491	51
Sand, Gravel, and Crushed Stone, 181 I.C.C. 373	47

Commission Reports—Continued
Seaboard Air Line Ry. Recs. v. *Carolina & Northwestern Ry. Co.*, 204 I.C.C. 416 ..... Page 29
S.P. & S. Railway Company & Oregon Trunk, 41 I.C.C. Val. Rep. 1. 25
Stickell, D. A., & Sons, Inc. v. *Alton R. Co.*, 255 I.C.C. 333 34
West Coast Lumbermen's Association v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 129 I.C.C. 363 ..... 25, 26
Western Pacific R. Co. v. *Northwestern Pacific R. Co.*, 191 I.C.C. 127 46
Williams, R.C., & Co., Inc. v. *New York Central R. Co.*, 269 I.C.C. 297 47
Statutes:
Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, *et seq.*:
Section 1(3) 21
Section 1(4) 6, 16, 30, 34, 70
Section 3 ..... 28, 31
Section 3(1) 6, 12, 15, 47, 51, 70
Section 3(4) 6, 12, 15, 31, 45, 46, 71
Section 15 ..... 28, 44
Section 15(3) 16, 30, 34, 44, 49, 53, 71
Section 15(4) ..... 2, 6, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 27, 28, 31, 36, 44, 45, 46, 49, 53, 72.
Mann-Elkins Act, 36 Stat. 539 17
Miscellaneous:
45 Cong. Rec. 3475–3476 17
86 Cong. Rec. 10165 22

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 306

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 307

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the District Court (R. 157–170) is reported at 182 F. Supp. 81. The report of the Interstate Commerce Commission (R. 83–151) is reported at 300 I.C.C. 453.

JURISDICTION

The judgment of the District Court dismissing the complaint was entered on March 25, 1960 (R. 157, 170) and the notices of appeal in Nos. 306 and 307 were filed on April 12, 1960 (R. 171–173) and May 23, 1960 (R. 174–176), respectively. Probable jurisdiction was noted on October 17, 1960 (R. 177; 364 U.S. 860). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, as amended, 49 U.S.C. 1, *et seq.*, are set forth in the Appendix, *infra*, pp. 70–73.

QUESTIONS PRESENTED

1. Whether Section 15(4) of the Interstate Commerce Act, which prohibits the Interstate Commerce Commission from establishing any through route which would require a railroad to include in such route substantially less than its entire length and that of any intermediate railroad "operated in conjunction and under a common management or control thereof," applies to a railroad (the SP&S) which is operated in conjunction and under the joint common management and control of *two* railroads.

2. Whether the Commission correctly held that through routes are not in existence (with certain exceptions) between the SP&S and appellant Milwaukee Railroad via Spokane, Washington.

3. Whether the Commission properly found that the refusal of the SP&S to establish through routes

and joint rates with the Milwaukee via Spokane does not result in discrimination against Milwaukee or in undue preference or prejudice between shippers or localities.

4. Whether the record supports the Commission's finding that appellants have not shown that establishment of through routes which would short haul the two railroads that own and operate the SP&S were necessary or desirable in the public interest in order to provide adequate and more efficient transportation.

STATEMENT

These are direct appeals from the final order of a three-judge district court dismissing the complaint[1] of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") seeking to set aside an order of the Interstate Commerce Commission entered in Docket No. 31466, *Chicago, Milwaukee, St. Paul and Pacific Railroad Company* v. *Spokane, P. & S. Ry. Co.* By that order, the Commission dismissed Milwaukee's complaint which sought an order requiring the Spokane, Portland and Seattle Railway Company ("SP&S") and its two wholly-owned subsidiaries, Oregon Trunk Railway and Oregon Electric Railway Company (the three collectively referred to as "SP&S System") to join with Milwaukee in through routes and joint rates via Spokane, Washington, as extensive as those the SP&S System par-

[1] Milwaukee's complaint was supported in the district court by the Secretary of Agriculture, National Livestock Producers' Association, Chicago Producers Commission Association, American National Cattlemen's Association, and National Wool Growers Association, as intervening plaintiffs (R. 75–76).

ticipates in with its two owners, The Great Northern Railway Company and The Northern Pacific Railway Company ("the Northern Lines").

The locations of these carriers are described in detail in the Commission's report (R. 94–96) and are shown on the maps attached to the brief for the appellee railroads. The line of the SP&S extends in a general westward direction along the water level route of the Snake and Columbia Rivers between Spokane, Washington, and the Pacific Ocean via Portland, Oregon. The Northern Lines operate through the northern tier of states between the Twin Cities and the head of the Great Lakes on the East, and Portland and coastal points in Washington on the West—their routes between Spokane and Portland being via Ashburn and Everett, Washington. The Northern Lines together serve the larger cities in northern Idaho, Montana, North Dakota, South Dakota and Minnesota, many of which are also served by the Milwaukee. The Milwaukee operates between Chicago and Westport, Indiana on the East, and Longview, Washington and coastal points on Puget Sound, Washington, on the West. Its lines east of the State of Montana are generally south of those of the Northern Lines but through the State of Montana parallel, to a large extent, that of the Northern Pacific. In the State of Washington its main line bypasses Spokane (which it serves over a branch) and extends to Seattle via a route lying generally between those of the Northern Lines. It serves no point in Oregon directly.

Generally, there is no interchange of traffic between the Milwaukee and the SP&S at Spokane (R. 93).

The principal reason for this is that the Northern Lines seek to obtain as much of the haul as possible on traffic which originates or terminates on the lines of the SP&S System (R. 107). This is done through the publication of joint through rates on all important commodities (R. 104) interchanged between the SP&S and the Northern Lines at Spokane, which are lower than a combination of the local rates of the SP&S and Milwaukee on traffic which could be interchanged between those two carriers at Spokane.

While the Milwaukee complained before the Commission of its lack of a full line of comparable joint through rates on "freight traffic of whatsoever nature" moving via Milwaukee between SP&S System points and points east of Spokane throughout the United States and in Canada and Mexico (R. 84–85), the record indicates that the Northern Lines are not opposed to the publication of such rates on traffic to or from Milwaukee local points (i.e., points served only by the Milwaukee) (R. 120). Thus, this proceeding is primarily concerned with (1) "bridge" traffic as to which Milwaukee would be an intermediate carrier and (2) traffic which moves to or from points served *in common* by Milwaukee and the Northern Lines or their connections. In short, Milwaukee seeks the establishment of an alternate through route via its line to points already served by other routes and at the same rates as apply via the other routes.

The Commission proceeding.—In its amended complaint filed with the Commission in 1954 (R. 13–24, 178–187), the Milwaukee alleged that the refusal of

the SP&S System and its connections to establish and maintain competitive through routes and joint through rates and charges applicable to all freight traffic moving between points on the SP&S System, on the one hand, and points throughout the United States and Canada east of Spokane, on the other, in conjunction with the Milwaukee through Spokane, violated Sections 1(4) and 3 (1) and (4) of the Interstate Commerce Act by depriving the public and the Milwaukee of the use of available and reasonable through routes at the reasonable and nondiscriminatory through rates allegedly necessary and desirable in the public interest (R. 84–85).

After extensive hearings, the hearing examiner issued his proposed report in which he recommended that the Commission find (1) that, with exceptions, no through routes exist for the movement of traffic by the SP&S and Milwaukee via Spokane; (2) that the SP&S is operated in conjunction and under a common management and control with the Northern Lines, as that term is used in Section 15(4); (3) that additional routes on certain commodities be established; and (4) that the rates applicable over such routes should not be higher than comparable rates over the existing Northern Line routes (R. 232, 245 and 281).

Upon exceptions to the examiner's report, the Commission, on May 10, 1957, issued its report and order dismissing the complaint. In essence, the Commission agreed with the hearing examiner's first two conclusions that, with exceptions, through routes do

not exist and that the relationship between the SP&S and Northern Lines entitles those carriers to the short-haul protection of Section 15(4); however, the Commission rejected his other two conclusions that through routes and rates on certain commodities should be established (R. 94, 107, 141–142).[2] On October 24, 1957, the Commission denied reconsideration (R. 153).

The court proceeding.—On April 2, 1958, the Milwaukee filed its complaint in the United States District Court for the Eastern District of Wisconsin to set aside the Commission's order (R. 1). The Secretary of Agriculture and four trade associations intervened as plaintiffs and six railroads intervened as defendants (R. 75–76).

The district court unanimously rejected all of appellants' contentions (R. 157–170). The court agreed with the Commission that two carriers otherwise competitive may and, under the evidence of this case, do manage and control a jointly owned subsidiary in such a way as to give those carriers the protection against being short hauled afforded by Section 15(4) of the Act. As to the other issues—all involving questions of fact—the court, "after a careful review of the record" (R. 170), held that the findings were supported by substantial evidence.

[2] The Commission did conclude, however, that "upon appropriate application therefor, the SP&S will be expected, in accordance with its stipulation, to establish through routes and joint rates with the Milwaukee on coal and wheat from origins on the Milwaukee in Montana" (R. 142).

SUMMARY OF ARGUMENT

I

Section 15(4) of the Interstate Commerce Act provides, in part, that the Commission shall not establish a through route which will "require a carrier by railroad * * * to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * *." The principal question here is whether the protection of Section 15(4) extends to two railroads where their relationship with a jointly owned affiliate is such that the Commission, since the date of construction of the affiliate, has considered it to be a part of the parent lines, rather than a separate line, for rate-making purposes, and where, on this record, the Commission found that the two parent lines jointly and actively manage and control the affiliate, particularly its traffic policy.

This Court's prior interpretation of Section 15(4), the obvious purpose of that provision, and the rationale of prior Commission and court decisions support the view of the Commission and the lower court that under such circumstances, the parent lines are entitled to the protection Section 15(4) provides against being short-hauled through the establishment of through routes over the lines of the affiliate and a railroad which competes with the parent lines.

The obvious purpose of the "common management or control" provision of Section 15(4) is to prevent

a railroad from being short-hauled not only on its own lines but also on the lines of an intermediate affiliated carrier with which it is operated as a unit in providing transportation service. As the district court pointed out, "The decision of the Commission in this case is consistent with this purpose, and there has been no sound reason, economic or otherwise, advanced why two joint owners are not only less in need of long haul protection than a single railroad which controls a subsidiary" (R. 168).

This Court has rejected appellants' view that the short-haul provision is to be narrowly construed as an exception to a remedial statute. *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 276; *Thompson* v. *United States*, 343 U.S. 549, 555–556 and 559; *Denver & Rio Grande R. Co.* v. *Union Pacific R. Co.*, 351 U.S. 321.

The decision of the Commission is consistent with its repeatedly expressed view in ratemaking cases that where two carriers are affiliated with another to the extent of controlling its traffic policy, the affiliate is under a common management or control with each of the parent lines and therefore should not be allowed to charge rates as high as those which are applied over lines not under a common management or control, on the theory that common management or control usually results in economies in operation which entitles the public to lower rates. The Commission's interpretation of Section 15(4) is also supported by *Louisville & Nashville R.R.* v. *United States*, 242 U.S. 60.

II

The Commission correctly concluded that, with limited exceptions, through routes do not exist between points on the SP&S and points on the Milwaukee and its connections via Spokane. "The question [whether a through route exists] in each case is one of fact" (*Rio Grande* case, *supra*, 351 U.S. at 327). "[T]he test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service" (*Thompson*, *supra*, 343 U.S. at 557; *Rio Grande* case, *supra*, at 330). A through route may exist for a particular commodity and not for others, and between particular points but not others via the same gateway. *Rio Grande* and *Thompson* cases, *supra*.

The Commission applied the foregoing criteria in determining whether through routes are in general existence between the SP&S and the Milwaukee via the Spokane gateway (R. 90–94). It pointed out that of the 6,384 carloads of SP&S traffic in which Milwaukee participated in 1952, only 513 were interchanged at Spokane between the SP&S and the Milwaukee (both eastbound and westbound); that all but 14 of these were destined to, or originated on, points on the Milwaukee itself; and that there was no showing that any of the 513 moved at combination rates. The Commission further found that "[t]here is no indication that any traffic has ever been solicited for routing via Spokane over a Milwaukee-SP&S route by which a higher combination rate applied, or

has ever moved over such a route"; and that, except for the 513 cars that moved under the joint rates, primarily to points on the Milwaukee's lines, "'the carriers' course of business' has been and is to use routes via Spokane composed of the SP&S and the Great Northern or the SP&S and the Northern Pacific." These findings, upheld by the court below, fully support the Commission's conclusion that, except for traffic to points primarily on the Milwaukee's lines, "there are no through routes, as that term is used in the act, between the areas comprised in the complaint in connection with the SP&S system and the Milwaukee via Spokane."

Appellants' belated assertion that, contrary to the Commission's finding, 126 of the 513 cars moved on combination rates, finds no affirmative support in the record. Moreover, it was not made at any time during the administrative proceeding or "at the time appropriate under [Commission] practice," *United States* v. *Tucker Truck Lines,* 334 U.S. 33, 36–37, and should not now be considered by this Court.

Appellants' reliance upon *Virginian Railway* v. *United States,* 272 U.S. 658, to support their view that the record here compels the conclusion that through routes (in the statutory sense) exist, is misplaced. Nothing in that case dispenses with the necessity of proof of the existence of a through route. This Court's later decision in the *Thompson* case emphasizes that a physically "available route" is not a "through" route in the absence of a holding out to perform the particular service over that route.

III

The Commission's findings that the refusal of SP&S to establish through routes and joint rates with the Milwaukee via Spokane does not result in discrimination against Milwaukee, or in undue preference and prejudice between shippers or localities, are supported by the record.

Section 3(4), which prohibits a railroad from discriminating in its rates between connecting lines, concededly is not involved under the facts of this case if the short-hauling provision of Section 15(4) is applicable (R. 165). Moreover, this Court's decision in *Louisville & Nashville* v. *United States, supra,* indicates that, even assuming absence of common management or control, Section 3(4) is not violated where a subsidiary joins with its two parents in through routes and rates but refuses to do so with an independent railroad.

Section 3(1) provides, in part, that no person may be subjected to undue or unreasonable preference or prejudice. Its prohibition is against unequal treatment by the same carrier, or group of carriers acting in concert, of competing shippers located at different points where the transportation circumstances and conditions are similar. That question, like the issue whether through routes exist, is one of fact. *Board of Trade* v. *United States,* 314 U.S. 534, 546; *United States* v. *Chicago Heights Trucking Co.,* 310 U.S. 344, 362.

The Commission found no basis for concluding that any shipper or locality was unduly prejudiced in relation to other shippers or localities similarly situated

(R. 141–142), and the lower court held that this finding was supported by substantial evidence (R. 170). The particular examples upon which appellants rely fall far short of a showing strong enough to compel the factual finding of undue preference and prejudice. Thus, no shipper had complained to the Commission, most shipper witnesses were secured by the efforts of the appellants and at least one testified that he didn't even know that there were no joint rates over a Milwaukee-SP&S route until a representative of the Farm Bureau talked with him about six weeks before the hearing (R. 475).

IV

Section 15(4) empowers the Commission to establish a through route which will short haul a railroad if it finds that such route "is needed in order to provide adequate, and more efficient or more economic, transportation."

Applying these standards as construed by this Court in *Pennsylvania R. Co.* v. *United States,* 323 U.S. 588, 593, the Commission fully considered the evidence concerning the alleged need for additional through routes, including the nature and number of existing through routes, but concluded that for the most part the record did not justify the establishment of additional routes. The lower court "after a careful review of the record" held this finding to be supported by substantial evidence (R. 170). The facts relied on by appellants did not require the Commission to find that additional through routes are needed.

591863—61——2

The Commission's conclusion is buttressed by the fact that the original proceeding was instituted by a carrier rather than by shippers; and that, of the numerous shippers who testified, only one (R. 137, 435–555 and 2552) had requested the establishment of any additional routes prior to the Commission's hearing on the complaint. On the other hand, shippers of lumber, grain and school, theater and church furniture indicated that they had no need for the opening of the Spokane Gateway (R. 125–126, 129 and 131–132). In short, until the Milwaukee instituted this case, there was little, if any, shipper demand for the establishment of additional through routes.

ARGUMENT

The issue in this case is whether the Interstate Commerce Commission correctly refused to prescribe through routes and joint rates between the SP&S System and the Milwaukee via Spokane, Washington, comparable to those that the SP&S System now has with its corporate parents, the Northern Lines. Appellants sought such relief before the Commission on alternate theories. First, they contended that through routes already exist between the SP&S and Milwaukee, and the Commission, therefore, need only fix joint rates over such routes. Second, they urged that if through routes are not in existence, the Commission should prescribe them. In support of the latter contention, they urged that the limitations in Section 15(4) of the Interstate Commerce Act upon the power of the Commission to prescribe through routes which result in short hauling a carrier—that is, re-

quiring the inclusion in the through route of substantially less than the entire length of such carrier and of a connecting carrier that is "operated in conjunction and under a common management or control therewith"—are not applicable when the "common management or control" of the affiliated carrier is that of two carriers jointly; and that, if such limitation is applicable, through routes should nevertheless be prescribed since the condition in Section 15(4) for overriding the shorthaul ban was satisfied, namely, that such through routes are necessary or desirable in the public interest, and needed to provide adequate, and more efficient or more economic, transportation. They also argued that the refusal of the SP&S to establish through routes and joint rates with the Milwaukee resulted in discrimination against the latter and undue prejudice against shippers or localities served by the Milwaukee, in violation of Sections 3(1) and 3(4) of the Act.

The Commission, and a unanimous three-judge district court, rejected each of these contentions. The district court also held that the Commission's findings are supported by the record. In this Court, appellants again press each of those contentions.

Logically, the question whether through routes are already in existence precedes the issue whether such routes should be prescribed, since if through routes are in existence the only remaining issue is what the rates thereover should be. Since we believe, however, as apparently also did the district court, that the statutory question whether Section 15(4) applies to an affiliated carrier operated under the joint con-

trol of two railroads is the most important issue in the case, we discuss that question first. We shall then show that the Commission correctly held that through routes are not in existence, and that appellants had not shown that the absence of such routes resulted in undue prejudice to shippers or localities on the Milwaukee. Finally, we shall show that the Commission's finding that appellants had not made a sufficient showing to justify the prescription of through routes and joint rates is supported by the record.

I

THE COMMISSION CORRECTLY HELD THAT SP&S IS SO OPERATED IN CONJUNCTION AND UNDER A COMMON MANAGEMENT AND CONTROL WITH GREAT NORTHERN AND NORTHERN PACIFIC AS TO ENTITLE THE LATTER TO PROTECTION UNDER SECTION 15(4) OF THE INTERSTATE COMMERCE ACT FROM THE SHORT HAULING WHICH WOULD RESULT IF SP&S WERE REQUIRED TO ENTER INTO THROUGH ROUTES VIA SPOKANE WITH THE MILWAUKEE

Section 1(4) of the Interstate Commerce Act requires railroads to establish reasonable through routes with each other. Where through routes are not established voluntarily, Section 15(3) authorizes the Commission to prescribe them "whenever deemed by it to be necessary or desirable in the public interest." This authority is restricted by the so-called "short-haul" provision of Section 15(4) which provides that, with certain exceptions not pertinent here, the Commission shall not establish such a route which will "require a carrier by railroad, without its consent, to embrace in such route substantially

less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * *."

This short-haul exception of Section 15(4) had its origin in the Mann-Elkins Act of 1910 (36 Stat. 539, 552). Senator Elkins explained its purpose to the Senate as follows (45 Cong. Rec. 3475–3476):

> The second exception to the grant of this power is one which has always been recognized in the transportation business of the country. The road that initiates the freight and starts it on its movement in interstate commerce should not be required, where it is a line not unreasonably long, to transfer its business from its own road to that of a competitor, especially when the commerce initiated by it can be as promptly and safely transported from the point of shipment to the point of destination by its road as by the line of its competitor.

While it is the initiating carrier to whom shippers look for car supply, rate information, tracing cars, etc., the protection against short-hauling provided by Section 15(4) is not restricted to initiating carriers. *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269.

The protection against short-hauling is applicable not only to a single carrier but also to "any intermediate railroad operated in conjunction and under a common management or control therewith." The term "common management and control" as used here is not defined in the Act, and the legislative history (discussed in the Secretary's brief, 50–55) sheds little

light upon its meaning. However, its obvious purpose is to treat as a single transportation enterprise the rail facilities which are operated as a unit in providing transportation service. It is clear that if either of the Northern Lines alone possessed the control of SP&S which they now share, such line and SP&S would be "under a common management or control" which would entitle them to the short-hauling protection of Section 15(4). The question in this case is whether that protection is lost because the SP&S is jointly controlled by the two Northern Lines which separately utilize it in providing through transportation service.

1. The relationship between the Northern Lines and SP&S is described in detail in the Commission's report (R. 96–101). Briefly, the Northern Lines built the SP&S for the purpose of relieving congestion, avoiding double tracking over the Cascade Mountains, and furnishing a road of low grades to the coast. *Portland Chamber of Commerce* v. *Oregon Railroad & Navigation Co.*, 19 I.C.C. 265. They own, in equal shares, the stock and bonds of SP&S. Their presidents alternate yearly as president and system vice president and personally pass upon the more important matters involving the SP&S. The SP&S is dependent, to a substantial extent, upon the Northern Lines for car supply. Traffic policies are directed and controlled jointly by the traffic departments of the Northern Lines—with local matters being left to the discretion of SP&S officers, and matters involving transcontinental traffic being handled for the SP&S by representatives of the Northern Lines.

The policy of the Northern Lines has been to protect the long hauls on traffic between points on the SP&S System, on the one hand, and points which can be served via the Northern Lines and their connections on the other (R. 107). The existence of this policy—disputed by the Milwaukee (Brief 64–65)—is dramatically illustrated by the fact that of the 6,384 carloads of SP&S freight in which the Milwaukee participated in 1952, all except 513 carloads were interchanged with the Northern Lines at points east of Spokane—primarily Minnesota Transfer at the Twin Cities, the eastern terminus of the Northern Lines; and that of the 513 carloads interchanged between the SP&S and the Milwaukee at Spokane, only 14 originated or terminated at points beyond the Milwaukee. The effectiveness of the policy is also shown by a comparison of the 513 carloads with the 53,923 carloads which the Northern Lines interchanged with the SP&S at Spokane in 1953 (R. 93, 121).

As noted above, the purpose of Section 15(4) is to provide protection against short-hauling for railroad transportation facilities which, though owned by separate corporate entities, are "operated in conjunction and under a common management or control." Again, we think it clear that if either one of the Northern Lines had constructed the SP&S, financed it, and controlled its traffic policies, such line and SP&S would be regarded as a single railroad under Section 15(4) and entitled to protection against short-hauling. Similarly, if each of the Northern Lines financed and controlled another carrier in constructing a route to the coast, each would be entitled to short-haul protec-

tion which would include such controlled railroad. Here, for obvious reasons of economy, the two Northern Lines jointly financed the construction of the SP&S to enable themselves to provide better transportation service. We submit that it would be inconsistent with both the purposes of Section 15(4) and with the National Transportation Policy to deny the Northern Lines the short-haul protection they have enjoyed for fifty years solely upon the ground that SP&S is "operated in conjunction with" both of them and is managed and controlled in pertinent respects by both of them—instead of with and by one of them exclusively.

2. The appellants contend (Milwaukee brief 21, Secretary's brief 54) that the short-haul proviso of Section 15(4) should be construed narrowly as an exception to remedial legislation authorizing the Commission to establish through routes. The short answer is that this Court has repeatedly rejected attempts by the Commission to interpret the short-haul clause restrictively. *United States* v. *Missouri Pacific R. Co.,* 278 U.S. 269, 276–279; *Thompson* v. *United States,* 343 U.S. 549, 555–556, 559. This history demonstrates that the Congressional purpose underlying Section 15(4) is not served by application of a mechanical rule of strict construction of exceptions Rather, as stated by Mr. Justice Frankfurter, dissenting in *Denver & Rio Grande R. Co.* v. *Union Pacific R. Co.,* 351 U.S. at 336:

> * * * It makes a vital difference whether § 15(4) is deemed a restriction on the power of the Interstate Commerce Commission which

> is to be closely confined and sharply construed or whether it is deemed to express a legislative command which ought to be heeded and not slightingly enforced. The fact of the matter is that we are dealing with a provision of the law which the Commission has long considered undesirable from the point of view of a national railroad policy and whose repeal it has consistently urged upon Congress. * * * Congress has emphatically made clear that in its view the national interest requires the protection of railroads against being short-hauled.

Appellants contend, however, that a restrictive interpretation of Section 15(4) is called for by the fact that although the Act was amended in 1940 to add a broad definition of control in Section 1(3)(b),[3] the broad definition does not apply to Section 15(4). But the legislative history of Section 1(3)(b) dictates against this view.

The new definition was derived from this Court's decision in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125. The obvious purpose of the

[3] Section 1(3)(b) as added to the Act in 1940, provides:

> For the purposes of sections 5, 12(1), 20, 204(a)(7), 210, 220, 304(b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

definition was to insure Commission jurisdiction over persons in indirect control of carriers. To apply such a definition to Section 15(4) would have had the inconsistent result of *restricting* the Commission's jurisdiction over carriers by affording them "short-haul" protection upon the mere showing of some indirect or inactive type of control. Accordingly, the Congress made clear that the new definition was not to apply to Section 15(4) because "it was thought undesirable to make any change in the interpretation of present law." Conference Committee Report on Transportation Act of 1940, 86 Cong. Rec. 10165.[4]

3. We turn, therefore, to an examination of Commission decisions prior to 1940 to discover the meaning of the term "control" as used in Section 15(4). These decisions support the view that joint control of the traffic policy of a common affiliate—as distinguished from mere unexercised power to control—is sufficient to bring the carriers within the protection of Section 15(4). As the lower court noted, the Commission's definition of common management and control had its origin in rate cases such as *Black-*

[4] The Conference Committee report stated:

> The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1(1)(a) and section 15(4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase "controlling, controlled by, or under common control with" a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corporation* v. *United States* * * *.

shear Mfg. Co. v. *Atlantic Coast Line R.R. Co.*, 87 I.C.C. 654 (1924). There, in prescribing two distance rate scales—one for application to movements over a single line "or over two or more lines under the same general management and control" and the other for application to movements "only where the lines embraced in the route are not under common ownership or control"—the Commission explained (p. 664):

> It should be understood that where the term "carriers under the same management and control" is used in this report, it refers to carriers generally controlled through ownership, lease, or otherwise to the extent of controlling traffic policy, even though separate corporate entity may be maintained.

As explained by the lower court (R. 167–168), in rate proceedings the Commission usually prescribed higher rates for application over lines not under a common management or control and a lower scale of rates for application over lines of carriers under such control, on the theory that a common management or control resulted in economies in operation which would entitle the public to lower rates.

Unless the same broad definition of common management or control is also applied to the short-haul provision, the benefits of joint operation which led the Commission to prescribe lower rates for affiliated carriers would be denied such carriers in an important respect. It is not surprising, therefore, that the Commission relied upon the same criteria in determining whether a parent line and its subsidiaries

were under common management or control within the meaning of Section 15(4). Thus, in one of the cases cited by the lower court (*Alabama T. & N.R. Corp.* v. *Southern Ry. Co.*, 148 I.C.C. 708 (1928)), the Commission stated (p. 711):

> Defendants' lines are a part of the Southern Railway system, hereinafter termed the System, and defendants rely upon paragraph 4 of section 15 of the Interstate Commerce Act, which limits the instances in which a common carrier may be required to short-haul itself in joint through hauls. Complainant maintains that the defendants' lines are separate and distinct; that the Southern, the A.G.S., and the C.N.O.&T.P. are not under a common management and control; and that this provision of the act does not apply to them.
>
> In *Blackshear Mfg. Co.* v. *A.C.L. R.R. Co.*, 87 I.C.C. 654, 664, in defining what was meant by "carriers under the same management and control" we said:
>
> "It should be understood that where the term 'carriers under the same management and control' is used in this report, it refers to carriers generally controlled through ownership, lease or otherwise to the extent of controlling traffic policy, even though separate corporate entity may be maintained."
>
> In *Routing on Cotton*, 129 I.C.C. 387, we treated the Southern, the A.G.S., and the C.N.O.&T.P. as 'under a common management and control,' and found that they had the right to restrict their routes so that they would not be short-hauled on cotton from and to the points dealt with therein. In *Routing of Lum-*

> *ber from A.T.&N.R.R. Stations*, 85 I.C.C. 527, we treated the Southern, the A.G.S., and the C.N.O.&T.P. as a single line for rate-making purposes, and recognized the right of the System to retain its long haul on traffic originating on the Alabama, Tennessee & Northern.

This and similar cases decided prior to 1940, and cited by the lower court (R. 164–169) and the Commission, show that the Commission gave the same interpretation to the term "common management or control" in both rate-making and in Section 15(4) proceedings.

The significance of this is that in rate cases during the same period the Commission clearly indicated that the term also included *joint* management or control of traffic policy. Most pertinent to this case are the seven proceedings[5] where the Commission noted that the SP&S, for rate-making purposes, must be considered as part of the Northern Lines rather than as an independent railroad. Thus, in *Portland Chamber of Commerce* v. *Oregon Railroad & Navigation Co.*, 19 I.C.C. 265 (1910), the Commission stated (at 283):

> It [the SP&S] was built by the Great Northern and Northern Pacific jointly for the pur-

[5] *Portland Chamber of Commerce* v. *Oregon Railroad & Navigation Co.*, 19 I.C.C. 265 (1910); *City of Astoria* v. *S.P.&S. Ry. Co.*, 38 I.C.C. 16 (1916); *Inland Empire Shippers League* v. *Director General*, 59 I.C.C. 321 (1920); *West Coast Lumbermen's Association* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 129 I.C.C. 363 (1927); *S.P.&S. Railway Company & Oregon Trunk*, 41 I.C.C. Valuation Reports 1 (1932); *Pillsbury-Astoria Flour Mills Co.* v. *Great Northern Railway Co.*, 198 I.C.C. 642 (1934); and the *Helix Milling Co., Inc.* v. *Great Northern Ry. Co.*, 287 I.C.C. 77 (1952).

> pose of relieving congestion, avoiding double tracking over the Cascade Mountains, and furnishing a road of low grades from western Washington to tidewater on the Pacific Coast. * * * So far as these proceedings are concerned, we believe the road must properly be considered a part of the Northern Pacific and Great Northern systems rather than as an independent line. It is used by the Great Northern and Northern Pacific in the transportation of all business between coast and interior points which can be handled more cheaply over it than over the existing lines of the Great Northern or Northern Pacific.

One of those seven proceedings (*West Coast Lumbermen's Association* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 129 I.C.C. 363 (1927) specifically involved the question of short-hauling. The complaint sought the prescription of joint through rates on lumber from origins on the SP&S the Great Northern and the Milwaukee to destinations on the Soo Line in Minnesota, Montana and the Dakotas via routes east of Spokane through Canada. Such rates, if ordered, would have deprived the Milwaukee of its long haul on traffic from the Milwaukee stations in Washington, the Great Northern of its long haul from Great Northern stations, and the Northern Lines of their long haul on traffic from SP&S stations in Washington and Oregon. The Commission declined to establish rates via the Canadian routes sought. It stated that the defendants (p. 364):

> urge that if joint rates are prescribed they should be made applicable over routes via Da-

> kota junctions. Over these routes the Northern Pacific, Great Northern, and Chicago, Milwaukee & St. Paul would secure the long haul to which they assert they are entitled. The Spokane, Portland & Seattle is considered, for rate-making purposes a part of the Northern Pacific and Great Northern.

The cases relied upon by appellants as indicating that the short-haul protection does not extend to a jointly-controlled carrier are distinguishable. In *Absorption of Switching Charges,* 157 I.C.C. 129 (1929) and *Manufacturers Ry. Co.* v. *Ahnapee & Western Ry. Co.,* 172 I.C.C. 554 (1931), the Commission did hold that the Terminal Railroad Association of St. Louis "owned by 14 or 15 trunk lines" (157 I.C.C. at 130) was not operated in conjunction and under a common management or control with its owners within the meaning of Section 15(4). But those cases held only that, under the facts there presented, common management or control had not been established, not that it cannot exist where the subsidiary is jointly managed or controlled by two or more carriers. The court below correctly stated (R. 170) that these two decisions—

> * * * due to their very short treatment of the issue of common management and control and because of the very large number of participants, are not persuasive on this issue.

Appellants also refer (Milwaukee Brief 26–28; Secretary Brief 57) to *Hughes Creek Coal Co.* v. *K. & M. Ry. Co.,* 29 I.C.C. 671, as another case where the Commission held that Section 15(4) does not include joint control of a subsidiary by two parent lines. The case

does not so hold. To the extent that Section 15(4) was involved at all in what was essentially a discrimination case under Section 3, it merely stands for the proposition that a railroad (the Chesapeake and Ohio) owning about 4/9ths of the stock of another line (the Kanawha & Michigan) and having but two out of the nine members of the Board of Directors had not been shown to control the latter. It is true that another railroad (the Lake Shore and Michigan Southern) owned slightly more of the Kanawha & Michigan stock than the C. & O., and had three of the nine directors. But there is nothing in the Commission's opinion indicating that if the two railroads had each owned half of the Kanawha & Michigan and had controlled its operation to the extent that the Northern Lines control the operation of the SP&S, Section 15 would not have applied. On the contrary, the fact that the Commission considered the factual situation in detail (despite the Lake Shore's larger interest in the Kanawha & Michigan than that enjoyed by the C. & O.) seems to indicate that it was aware that Section 15 could apply to the situation where more than one railroad jointly own and control another.

The Milwaukee refers (Brief 43–44) to one case* which it claims "deals the final blow to the theory of the District Court that rate-making cases and through route cases follow a uniform pattern." In that proceeding, which also involved the Terminal Railroad

* *Independent Paper Stock Co.* v. *Chicago & A. R. Co.* (1930) 168 I.C.C. 404.

Association of St. Louis, the report of a division of the Commission contained the following statement:

> The Chicago & Alton does not reach St. Louis, but it is one of the proprietary lines of the Terminal, and for rate-making purposes that carrier and the Terminal are treated as one line.

The Milwaukee misreads the quoted statement as saying that in rate making cases a division of the Commission treated the Terminal and the Chicago and Alton as one line. The division was there dealing with shipments from St. Louis to a point in Illinois. The Missouri Pacific Railroad originated the shipments as a switching line, turned them over to the Terminal which transported them across the river and turned them over to the Chicago & Alton. The tariffs showed the Chicago & Alton as the originating line. The Commission stated that since the Terminal "is a terminal line for the Chicago & Alton it must necessarily concur in the tariff, but it need not be shown in the list of stations as a carrier over which traffic would move * * *." In other words the *carriers,* under their tariffs, rather than the Commission, treated Terminal as a part of the Chicago and Alton for rate making purposes.

4. Another indication of the Commission's view that common management or control is present in any situation where the affiliation extends to control of traffic policy, is found in *Seaboard Air Line Ry. Recs.* v. *Carolina & Northwestern Ry. Co.,* 204 I.C.C. 416. There the complainant alleged that the defend-

ants' routing restrictions closed, for all practical purposes, routes over complainants' lines and that such restrictions were in violation of Sections 1(4) and 15(3) of the Act and resulted in discrimination against complainants in violation of the then Section 3(3), the forerunner of the present Section 3(4). In considering these questions, the Commission stated (p. 420):

> The officials of the Carolina & Northwestern determine the policy to be adopted with regard to traffic matters local to that carrier, but in matters of common interest between the Southern and the Carolina & Northwestern, the policy determined by the Southern prevails. It is apparent, therefore, that both carriers are operated under a common management and control. The participation by the Carolina & Northwestern with the affiliated Southern in joint rates on cotton on a basis lower than those prescribed in the *Cotton* case, while refusing to participate in the same basis of rates with the unaffiliated complainants, does not constitute discrimination in violation of section 3(3) of the act.

In referring to that case, the court below stated (R. 165):

> * * * Although not a Section 15(4) case, the decision is nonetheless important for the Commission recognized that retention of the long haul by railroads under common management and control as defined in the *Blackshear* case was not a violation of Section 3(4). The plaintiff has conceded that there can be no violation of Section 3(4) if the defendant railroads are

under common management or control as prescribed in Section 15(4).

Because of this relationship between Section 15(4) and Section 3(4), both the Commission and the district court found support for their position in this Court's decision in *Louisville & Nashville R.R.* v. *United States,* 242 U.S. 60. In that case, the Court had before it the question whether the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, through their joint ownership of the Nashville Terminals, were discriminating against the Tennessee Central by requiring their joint agency to switch for themselves and in refusing to permit it to switch for the Tennessee Central. It was charged that the two owning carriers were thus discriminating against the Tennessee Central in violation of the then paragraph [7] of Section 3 of the Act which was the forerunner of the present Section 3(4). This Court, in rejecting the argument and finding that the case came within the proviso making the section inapplicable to a carrier's use of "its tracks or terminal facilities", stated (p. 73):

[7] The section as then written provided in pertinent part:

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

> * * * the two appellants had a common interest, although competitors—an interest that also was public and in which the city of Nashville shared. * * * if either carrier owned and used this terminal alone, it could not be found to discriminate against the Tennessee Central by merely refusing to switch for it, that is, to move a car to or from a final or starting point from or to a point of interchange. We conceive that what is true of one owner would be equally true of two joint owners * * *.

The Milwaukee attempts to distinguish this case on the ground that because of stock ownership the control of the agencies and instrumentalities there involved was ultimately vested in only one railroad, the L. & N. (Brief 40–41). But this Court decided the case upon the basis that control was vested in two railroads, not one, and that those two roads were, as it described them, "competitors." Respecting the application of that principle to the present case, the court below said (R. 169–170):

> In the instant case there is also a situation presented where if there were only one owner there could be no possible discrimination. In the case at bar this is so because of the presence of Section 15(4). In the *Louisville* case it resulted, from the wording of the forerunner of Section 3(4). In other words, although the reasons for the impossibility of discrimination in a single owner situation are different, the result is still the same.
>
> * * * It is obvious that these sections must be read together for an inconsistency between the two would be untenable.

Cf. *Minneapolis Civic and Commerce Association* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 247 U.S. 490.

II

THE COMMISSION CORRECTLY HELD THAT, WITH EXCEPTIONS, THROUGH ROUTES DO NOT EXIST OVER SP&S-MILWAUKEE VIA SPOKANE

1. A through route is ordinarily an arrangement, expressed or implied, between connecting carriers, for the through carriage of goods. It is voluntarily established when the participating carriers "hold themselves out as offering through transportation service." *Thompson* v. *United States*, 343 U.S. 549, 557. A "holding out" is readily manifested where the connecting carriers publish rates, whether they be joint or so-called proportional,* which are less than the aggregate of their respective local rates. Absent such through rates,† the holding out may be manifested by other conduct, such as open solicitation of through traffic to be carried over a particular route or actual movement of a sufficient amount of traffic on through bills of lading to indicate a practice and hence a

---

*"When a through rate consists of a combination of rates for intermediate distances, the rate for one segment of the shipment is referred to as a proportional rate where * * * that rate is lower than the local rate over that segment." *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 566, fn. 2.

†Here, with the exceptions noted, a shipper routing traffic over a Milwaukee-SP&S route would have been obliged to pay charges based upon the aggregate of the local rates of the 2 carriers which would have been higher than the joint rate available over the routes via the Northern Lines. Of course, charging a combination of local rates would not in itself disprove the existence of a through route.

"holding out." As this Court stated in the *Rio Grande* case, *supra*, 351 U.S. 321, 327:

> * * * Findings of through routes can therefore be made on the basis of express agreements between carriers or on the basis of inferences drawn from continuous practices sufficient to show that through routes exist even though not provided for in formal contracts or tariffs. The question in each case is one of fact.

Proof of through routes for the transportation of a particular commodity between particular points does not establish the existence of other through routes via the same gateway on other commodities or between other points. Otherwise, each time two carriers establish a restricted through route via a junction, under the provision of Section 1(4) of the Act, to meet the needs of a particular shipper, or any time the Commission establishes on a specified commodity such a restricted route under the provisions of Section 15(3), through routes would be established for all commodities between all points on both carriers regardless of any public need therefor.[10]

Both the *Thompson* and *Rio Grande* cases, *supra*, support this view. Thus, in *Thompson*, where through routes existed via the junction of Concordia to local points on the Burlington short of Omaha, this Court stated (343 U.S. at 559):

---

[10] The Commission has, on various occasions, prescribed through routes on a single commodity without opening those routes to all commodities. See, *e.g.*, *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I.C.C. 333; and *Adrian Grain Co.* v. *Ann Arbor R. Co.*, 276 I.C.C. 331. It did so in this case with respect to coal and wheat. (See R. 142).

> * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern.

And in the *Rio Grande* case, there were through routes and rates from Union Pacific origins via Ogden, Utah, and the Rio Grande on sheep and goats and also on lumber from points on the Union Pacific to local points on the Rio Grande. 287 I.C.C. 611 at 639 and 646. This Court affirmed the finding of the Commission that through routes via Ogden did not exist to or from Colorado common points (those served by more than one carrier including Rio Grande) or points east thereof on commodities other than sheep and goats.

2. Guided by these criteria, the Commission found in the instant case that, with certain exceptions, "there are no through routes, as that term is used in the Act, between the areas comprised in the complaint, in connection with the SP&S System and the Milwaukee via Spokane"[11] (R. 94). It therefore re-

[11] The Commission stated (R. 90):

> The first question for determination, therefore, is whether or not the present routes via the Spokane gateway composed of the lines of the SP&S and the complainant

jected the argument that the short-haul restrictions of Section 15(4) could be by-passed, and joint rates for SP&S-Milwaukee service via Spokane generally be imposed by the Commission.

The finding that through routes do not exist is based upon the following facts. The general traffic policy of each of the lines serving the Pacific Northwest is to preserve to each carrier the long haul on eastbound traffic which originates in the Pacific Northwest and on westbound traffic which terminates in that area (R. 138 and 783). Following that policy, the Northern Lines, as a rule, have refused to allow the SP&S to enter into arrangements with the Milwaukee for through transportation via Spokane on traffic which the Northern Lines can handle. This is shown not only by the testimony of witnesses to that effect (R. 783, 1975, 2671, 2686, 2702–2703 and 2770), but also by the existence of a full line of joint rates between their lines and the SP&S System via Spokane, as contrasted with a limited number of joint rates, and traffic moving thereunder, between the SP&S System and Milwaukee via Spokane, as well as by

---

constitute "through routes" as that term is used in section 15 (3) and (4) of the act. As above stated and as testified by numerous shippers in this proceeding, the Spokane-gateway routes, insofar as the complainant's lines are concerned, with the exceptions listed in appendix B, [footnote omitted] are not considered as open or through routes commercially, but as routes that are effectually closed to shippers because of the higher combination rates which apply thereover. A finding that such routes should be opened to shippers on a commercial basis by establishing the competitive joint rates sought would result in the establishment of such routes as effective through routes.

the absence of any showing of solicitation or movement of traffic on through bills of lading through Spokane at the combination rates."[12] The effectiveness of this practice is evidenced by the fact that, in 1952, of the 6,384 carloads of SP&S traffic in which Milwaukee participated, all but 513 were interchanged with connecting lines at junctions east of Spokane—principally Minnesota Transfer at the Twin Cities, the eastern terminus of the Northern Lines (R. 93–94; Ex. 1, R. 387, 3117–3144).

The 513 carloads did move over a Milwaukee-SP&S route via Spokane, but the Commission found (R. 93):

> The record indicates that the foregoing shipments moved at joint through rates. There is no indication that any traffic has ever been solicited for routing via Spokane over a Milwaukee-S.P.&S. route by which a * * * combination rate applied, or has ever moved over such a route.

The list of the joint rates over an SP&S-Milwaukee route via Spokane is attached to the Commission's report as Exhibit B (R. 149–151). Excepting lumber and export-import traffic, those rates apply substantially to a limited number of origins and destinations of the Milwaukee in Washington and Idaho and a few enumerated origins and destinations of the SP&S. For example, through rates are published on petro-

[12] Both the examiner and the Commission specifically stated: "There is no indication that any traffic has ever been solicited for routing via Spokane over a Milwaukee-SP&S route by which a higher combination rate applied, or has ever moved over such a route" (R. 93 and 231). Appellants' attack on this finding is discussed below.

leum products from East Pasco, Washington on the SP&S to seven Milwaukee stations in Idaho and Washington. The lumber rates apply from SP&S origins to most local destinations on the Milwaukee west of Chicago and to a limited number of stations served in common by the Milwaukee and other carriers. As the Commission noted (R. 120):

> As indicated, there have been published or approved a full line of joint through rates on forest products from S.P.&S. points to most points on the Milwaukee east of Spokane, and a very limited number of joint through rates on other commodities between S.P.&S. points and Milwaukee local territory west of the Twin Cities. Whenever there is an application indicating a need therefor, the northern lines are agreeable to ıe establishment of additional joint through rates, between the S.P.&S. and the Milwaukee on other classes and commodities to and from Milwaukee local territory.

The export-import rates, of course, apply only on commodities moving through the ports.

Under the criteria discussed above, these facts fall far short of proof of a voluntary holding out, either expressed or implied, by the two carriers to perform a general through service via Spokane betweeen all points and on all commodities or, for that matter, to perform a general through service between any other points than those described in Appendix B to the Commission's report. For example, the holding out to perform a through service on shipments of eastbound lumber from SP&S points to points short of Chicago does not establish a holding out to perform a

through service on lumber (to say nothing of other products) to Chicago and beyond. *Thompson* case, *supra*. And the holding out to perform through service on export-import traffic moving to or from the designated ports does not establish a holding out to perform a through service to or from any other stations or on any other traffic.

Indeed, the limited number of joint rates, together with the lack of any showing that traffic is solicited for movement over the SP&S-Milwaukee routes via Spokane at combination rates or that such traffic has moved on through bills, would seem to compel a finding that these carriers do not hold themselves out to perform a through service via Spokane on traffic other than that listed in Appendix B to the Commission's report. These facts provide even less proof of the existence of general through routes than those in the *Rio Grande* case where the routes had at one time been open generally (351 U.S. at 328–330) and where a small number of shipments had actually "trickled through" the Ogden gateway on through bills and at combination rates. This Court, in affirming the Commission's finding that the existence of through routes (other than those on sheep and goats and lumber) had not been proved, stated (351 U.S. at 330):

> We adhere to the "holding out" test of the *Thompson* case. The evidence before the Commission was not such as to compel it to find that Union Pacific held itself out as offering through service over the Rio Grande lines.

3. As noted above, in the instant case the Commission found, as did the examiner, that the 513 cars

moved at joint through rates and, unlike the *Rio Grande* case, that there was no indication that any traffic had ever moved over the routes at combination rates. Neither of appellants took exception to that finding in the administrative proceeding. However, for the first time in the lower court the Secretary contended, and now both appellants contend, that the Commission's finding is in error; that 126 of those shipments moved at combination rates; and that such movements at combination rates showed the existence of through routes generally. They do not specify the commodity, origins or destinations involved or whether, as in *Rio Grande*, those cars simply "trickled through." We submit that under the principle enunciated in *United States* v. *Tucker Truck Lines*, 344 U.S. 33, and other cases, the issue is raised too late and that, in any event, the record adequately supports the Commission's finding.

a. In the *Tucker* case, which involved the validity of a Commission proceeding where the hearing had been conducted by an examiner not qualified under the Administrative Procedure Act and where the objection to the examiner's participation was raised for the first time in the civil action brought to review the Commission's order, this Court said (pp. 36–37):

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged

> in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice. [Footnotes omitted.]

Also see *Adams* v. *Mills*, 286 U.S. 397, 416–417; *United States* v. *Hancock Truck Lines*, 324 U.S. 774, 779; *General Transportation Co.* v. *United States*, 65 F. Supp. 981, 984 (D. Mass.), affirmed, 329 U.S. 668; and *Transamerican Freight Lines* v. *United States*, 51 F. Supp. 405, 412 fn. 10 (D. Del.). The same rule is applicable here, for the appellants do not indicate that the Commission was ever given an opportunity to rule upon this issue, much less "at the time appropriate under its practice."

b. In any event, the appellants had the burden of showing that through routes were in existence by proving that shipments moved via Spokane at combination rates. The record is devoid of evidence that any particular commodity has moved via Spokane at combination rates.[13] The Milwaukee's own exhibit, showing the estimated revenues it would have received had it interchanged at Spokane all of the 6,384 carloads of SP&S traffic it carried, proved that the revenues on the 513 cars would have been the same

[13] Appellants seek to support their argument by reference to the statement of a witness (R. 321–322) that, of the cars listed in Exhibit 1, 387 moved under through rates via the Spokane gateway. The witness, however, made no reference to the other 126 cars, and his statement cannot be taken as any evidence of the manner in which they were shipped, or that he was even aware of their existence.

(Ex. 18; R. 1147, 3146). The witness in explaining his exhibit stated (R. 1060):

> No increase in revenue was computed on carloads which originated or terminated on the Milwaukee Road and which were actually interchanged between the Milwaukee and the SP&S at Spokane as practically all of this traffic moved on the through rates, the revenue picture would be unchanged.

Though the witness qualified his statement by the words "practically all," the fact is that he did not show that a single one of the 513 carloads interchanged at Spokane moved on other than a joint through rate, and the treatment of those cars in his study shows that he assumed the contrary to be the fact.

Moreover, the Commission's finding is further supported by the statement of the SP&S traffic manager who testified, when asked whether a shipper would be able to route traffic over an SP&S-Milwaukee route via Spokane for which joint rates were not in effect (R. 2653):

> We have never had any traffic like that offered to us and I am not going to speculate what we would do.

4. The brunt of appellants' attack on the finding concerning the lack of through routes is that, since the Commission stated in its report that "routes are available" via Spokane but are commercially closed, a finding of the existence of "through routes" automatically follows under the ruling of this Court in *Virginian Railway* v. *United States*, 272 U.S. 658.

Appellants misread not only the Commission's report, but also the *Virginian* case. In stating that "routes are available," the Commission was referring to the fact that Spokane is a junction for the two carriers and that there are facilities for interchange of traffic here. In stating that these routes are commercially closed, the Commission was referring to the fact that, because of the existence of through routes over other lines at joint rates, shippers do not attempt to use the route composed of the SP&S and Milwaukee via Spokane because they would have to pay a combination of the local rates of each carrier to and from the junction, which would be substantially higher than the rates over existing through routes. The *Thompson* decision teaches that such a route, theoretically available but not actually used, is not a "through route".

Thompson also teaches that the *Virginian* case is inapposite because here there are no through routes whatever for the particular traffic involved, whereas in the *Virginian* case through routes existed on coal to the West but could not be used by some of the shippers because of the Virginian's discriminatory rate practices over its portion of the route. In *Thompson,* this Court noted that there was no finding that the local rate charged by the Missouri Pacific was unreasonable or discriminatory. (343 U.S. at 560, n. 18). Likewise here there is no finding that the local rate charged by the SP&S is either unreasonable or discriminatory.

As this Court indicated in the *Virginian* case (272 U.S. at 666):

> * * * the order here in question was not sought or made under section 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination.

Nothing in that case dispenses with the necessity of proof of the existence of a through route, as that term is used in Section 15.

Appellants also rely upon *Great Northern Railway Co.* v. *United States,* 81 F. Supp. 921 (D. Del.), affirmed, 336 U.S. 933. That case is authority only for the proposition that, if through routes exist, the Commission may order transit or other accessorial privileges thereover without regard to the provisions of Section 15 (3) and (4). As the district court stated in that case (p. 925):

> We think that a transit is an accompaniment or supplementary advantage in connection with an existing through route but does not, in itself, create the through route. The existence of a transit implies the existence of the through route. A transit at a particular point is the voluntary or required action of the particular carrier at such point, but a through route is not created by creating a transit.

Finally, the appellants' contention that the Commission erred as a matter of law in considering the circumstances that SP&S and Milwaukee routes via Spokane are "commercially closed" by prohibitive combination rates as evidence that through routes did not exist, is completely answered by this Court's holding in the *Rio Grande* case, *supra.* The Court

there held that the commercial closing of possible routes is a factor properly "considered along with other circumstances in determining whether through routes now exist" (351 U.S. at 328–329).

III

THE REFUSAL OF THE SP&S TO ESTABLISH THROUGH ROUTES AND JOINT RATES WITH THE MILWAUKEE VIA SPOKANE DOES NOT RESULT IN DISCRIMINATION AGAINST THE MILWAUKEE, OR IN UNDUE PREFERENCE OR PREJUDICE BETWEEN SHIPPERS OR LOCALITIES

Another factual issue which appellants argue concerns the basis for the Commission's finding (R. 141–142):

> That the failure and refusal of the SP&S to join in the establishment of through routes and joint rates via Spokane in connection with the Milwaukee and its connections, the same as apply via Spokane in connection with the northern lines and their connections, does not result in discrimination against the Milwaukee, [Section 3(4)] nor in undue preference or prejudice between shippers or localities [Section 3(1)].

The Section 3(4) issue—discrimination by a carrier in rates between connecting lines—is concededly (R. 165; Milwaukee's Br. 73) not involved under the facts of this case if the "short-haul" provision of Section 15(4) is applicable. For if mere retention of their long haul by carriers under common management or control within the meaning of Section 15(4) constitutes discrimination against a connecting line

in violation of Section 3(4), the protection afforded by Section 15(4) would be completely destroyed. One section of the Act cannot be construed to nullify another section. *Ex Parte Public Bank,* 278 U.S. 101, 104; *Joseph A. Goddard Realty Company* v. *N.Y.C. & St. L.R. Co.,* 229 I.C.C. 497, 503.

It is only where carriers under common management or control participate in through rates with some connecting carriers not under common management or control while refusing to participate in similar rates with other connections, that there can be a violation of Section 3(4). See *Western Pacific R. Co.* v. *Northwestern Pacific R. Co.,* 191 I.C.C. 127, 134; *Union Pacific Railroad Co.* v. *United States of America,* 132 F. Supp. 72, 80–81; and the *Rio Grande* case, 351 U.S. 321 at 335.

There is no showing here that the SP&S and the Northern Lines join at Spokane with any independent carrier in joint through rates while at the same time refusing to join in such rates with the Milwaukee. Moreover, this Court's decision in the *Louisville* case *supra,* 242 U.S. 60, would seem to support the proposition that—even assuming absence of common management or control—Section 3(4) is not violated where a subsidiary joins with its two parents in through routes and rates but refuses to join with an independent railroad. See the discussion at pp. 31–33, *supra.*

If, in the instant proceeding, the Northern Lines had severally used the SP&S tracks, this would not have entitled the Milwaukee also to do so. There is, accordingly, no discrimination in their adoption

of the more economical method of a single agency for the utilization of these facilities for the benefit of both lines. Cf. *Western Pacific R. Co.* v. *Northwestern Pacific R. Co.*, 191 I.C.C. 127.

We turn then to a consideration of Section 3(1) and the arguments of appellants that the record compels a finding that the existing pattern of rates results in undue prejudice to certain shippers, who are not parties to the court litigation.[14]

1. Insofar as is pertinent here, Section 3(1) provides that a carrier may not subject any person to "undue or unreasonable preference or prejudice." It prohibits unequal treatment by the same carrier, or group of carriers acting in concert,[15] of competing shippers located at different points where the transportation circumstances and conditions are similar. *R. C. Williams & Co. Inc.* v. *New York Central R. Co.*, 269 I.C.C. 297, 301; and *Sand, Gravel, and Crushed Stone*, 181 I.C.C. 373, 393.

The question whether the preference or prejudice is *undue* or *unreasonable* is one of fact for the Commission's determination. *Board of Trade* v. *United States*, 314 U.S. 534, 546; *United States* v. *Chicago*

[14] Although shippers participated in the Commission proceeding, none intervened in the court proceeding. It is well established that the courts "will not listen to a party who complains of a grievance which is not his." *Interstate Commerce Commission* v. *Chicago, R.I. & Pac. Ry.*, 218 U.S. 88, 109.

[15] "A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order or correction of the disparity is to run against it or them. * * *" *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 650. Also, see *Central R.R. Co.* v. *United States*, 257 U.S. 247.

Heights Trucking Co., 310 U.S. 344, 352; *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 521, 524; *New York* v. *United States*, 331 U.S. 284, 347.

In this case, the Commission examined the evidence and found no basis for concluding that any shipper or locality was unduly prejudiced in relation to other shippers or localities similarly situated (R. 141–142). The court below held that this finding was supported by substantial evidence (R. 170).

2. The Secretary, in a one paragraph argument (Br. 72), points to seven record references as showing testimony of "numerous shippers and consignees" that they cannot compete effectively with shippers and consignees located on the Northern Lines. The record references are to pages of the testimony of a shipper of lumber at St. Maries, Idaho, and grain shippers, including one who testified that there was no need for the additional routes so far as his company was concerned (R. 1558, 1560 and 1571). The Milwaukee—probably due to the devastating adverse testimony of its principal witness on the subject (R. 430–435)—now abandons the claim (Jurisdictional Statement, p. 17) that the shippers of sheep are prejudiced under the existing rate structure, and limits its argument to the alleged predicament of the shippers of lumber and forest products (Br. 74).

The particular examples cited by the appellants fall short of a showing strong enough to compel the factual finding of undue preference and prejudice between competing shippers. Indeed, the testimony of these shippers was not directed to a competitive situa-

tion so much as it was to a general desire for unrestricted routing.

For example, as the Commission indicates in its detailed summary of the evidence concerning shipping practices in the lumber industry (R. 123–127, 139), the shippers of lumber eastbound from SP&S points desire unrestricted routes over the Milwaukee's line in addition to the available through routes to the east so that lumber not sold at points along the Milwaukee may be routed to other destinations. Such evidence, at best, relates to the *need* for *additional* routes under Sections 15(3) and 15(4), and does not constitute proof of undue preference and prejudice between competing shippers.

A specific example cited by both appellants and urged upon the court below concerns the situation at St. Maries, Idaho, a local point on the Milwaukee 63 miles east of Spokane. As the Commission notes in its report (R. 125), a manufacturer and wholesaler of lumber located there remanufactures and finishes lumber in transit and ships an average of 1,000 cars per year (R. 370–381, 1523, 1544). Under the existing system of routes and rates, he has available, in addition to his sources of supply of lumber located at points served by the Milwaukee in the State of Washington, (and his own supply at St. Maries), sources of supply in Oregon at points served by the Union Pacific and the Southern Pacific, which publish joint rates with the Milwaukee via Marengo, Washington. There are certain restrictions on the use of these routes via Marengo to which the shipper objected (R. 1537 and 1538), although he testified that

he had not been bothered by them "so far" (R. 376). Over these routes this shipper is able to reach most of the territory served by the SP&S system. The shipper stated on cross-examination that he is in "friendly" competition (R. 1532) with other mills in his area, including those located at points served by more than one railroad (Coeur d'Alene, Idaho, and points in Montana—(R. 379 and 1531)), but did not expand upon the nature of such friendly competition.

Under the policy of all the carriers serving the Pacific Northwest to restrict their through routes to protect their long haul, this shipper is in no worse position than the many other mills located at local points, including those on other railroads, east of Spokane. They, too, cannot obtain lumber from off-line origins for transit and for further movement at joint through rates. The gist of his position is not that he is prejudiced by the existing routes and rates, but rather that additional routes are desirable.

Moreover, the evidence also indicates that this shipper is not materially affected by the present rate and routing situation. Thus, Exhibit 112 (R. 2764, not printed) contains a list of lumber mills in Oregon and Washington west of Spokane, Washington, and Pendleton, Oregon, and the carriers that serve them. Of the 579 mills listed, the Union Pacific and the Southern Pacific serve 445. Forty-five mills in Washington are at points served by the Milwaukee, but not served by the Union Pacific or Southern Pacific. Thus, 490, or 85 percent of the total mills in both States, may ship lumber by the Milwaukee direct, or on joint rates by

the Union Pacific through Marengo and then by the Milwaukee, with stops at St. Maries to complete loading.

Exhibits 112–113 (R. 2764, not printed) also show that, of the 121 mills served by the SP&S, only 44 are served exclusively by it. These 44 mills constitute only 8 percent of the total 579 mills in the States of Washington and Oregon. Obviously, the St. Maries mill is under no serious handicap because of the fact that it cannot reach the 8 percent of the mills served exclusively by the SP&S system except on shipments to Milwaukee destinations.

Plainly, this type of testimony did not compel the Commission to find a violation of Section 3(1).

The Milwaukee attempts to compare the St. Maries case (and a similar case at Santa) with the facts involved in *Preston-Shaffer Milling Co.* v. *Great Northern Ry. Co.*, 304 I.C.C. 491, order sustained in *Great Northern Ry. Co.* v. *United States*, 172 F. Supp. 705 (D. Minn.), judgment vacated for mootness, 362 U.S. 939. But the issue here is whether there is substantial evidence to support the Commission's order in this case, not whether these are "alleged inconsistencies in findings made in other proceedings before it [the Commission]." *Virginian Railway* v. *United States*, 272 U.S. 658, 665–666; see *M. & M. Transportation Co.* v. *United States*, 128 F. Supp. 296, 301 (D. Mass.), affirmed, 350 U.S. 857.

Examination of the testimony of the seven witnesses to whom the Secretary refers (Br. 72), in his effort to show a violation of Section 3(1), demonstrates the lack of substance to this claim. The first reference

(IR. 379–381) is to the situation at St. Maries which we have discussed above. And his last reference (IVR 1572) is to part of the testimony of a witness for the railroad appellees who testified, in effect, that there was no need for the additional through routes sought by the Milwaukee (R. 1558, 1560, 1571). The second, third, fifth and sixth references (IR 454–457, 469–471; IIR 637 and 931) are to the testimony of witnesses desiring through routes on grain from Montana points on the Milwaukee to points on the SP&S, primarily Astoria. Since, as the Commission particularly noted in its report, the SP&S is willing to establish through routes and joint rates on such traffic, those dealers have no complaint (R. 129 and see 489—2555). Indeed, the flavor of the testimony of many of the Milwaukee's witnesses is indicated by that of the grain dealer at White Sulphur Springs, Montana, who stated that he did not even know that there were no joint through rates over a Milwaukee-SP&S route until a representative of the Farm Bureau talked with him about six weeks before the hearing (R. 475).

The remaining reference (IIR 620–621) is to a portion of the testimony of a witness representing the Montana Citizens Freight Rate Association who was convinced that the Milwaukee's proposal would provide an "additional improved rate program into Montana" (R. 617) and advocated open routing over all lines serving the State. His reference to the fact that the Northern Pacific parallels the Milwaukee through most of the State and to the "transportation user who lives on the NP side of the track under the

present rate program gets better rate treatment from the SP&S than the shipper located across the river on the Milwaukee" (R. 620) conveys little if any information other than the fact, which he himself acknowledged, that there is no holding out by the SP&S and the Milwaukee to perform a through service on most traffic. Indeed his testimony, as did that of all the others, related to the alleged need for additional routes, not to preference and prejudice between competing shippers similarly situated.

IV

THE COMMISSION'S FINDING THAT APPELLANTS HAD NOT SATISFIED THE STANDARDS OF SECTION 15(4) FOR THE ESTABLISHMENT OF NEW THROUGH ROUTES WHICH WOULD SHORT-HAUL NORTHERN PACIFIC AND GREAT NORTHERN IS SUPPORTED BY THE RECORD

Lastly, appellants challenge the Commission's conclusion that a sufficient showing had not been made to justify establishment of the requested routes and rates.

Section 15(3) authorizes the Commission to establish through routes and joint rates deemed by it to be necessary or desirable in the public interest, and Section 15(4) authorizes the Commission to disregard the short-hauling provision where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." The Commission noted that under these criteria consideration must first be given to the adequacy of the transportation, and second to the

efficiency and economy of the transportation,[16] and stated that the considerations of the second type are not determinative unless the existing routes can be found not to provide "adequate" transportation (R. 138).

After an extensive discussion of the evidence, the Commission found (R. 142):

> That it is not shown to be necessary or desirable in the public interest, in order to provide adequate and more efficient or more economical transportation, to require the establishment of through routes and joint rates in connection with the SP&S system and the Milwaukee and its connections via Spokane the same as apply in connection with the SP&S system and the northern lines and their connections via Spokane.

(However, since during the proceeding there developed general recognition of a need for certain through routes for coal and wheat, the Commission stated in its report (R. 142) that SP&S would be expected to establish such routes.) The district court was of the view that this finding is supported by substantial evidence and should not be disturbed (R. 170).

In evaluating this conclusion, it is important to note at the outset that the original proceeding was instituted by a carrier, rather than by shippers.

---

[16] In *Pennsylvania R. Co.* v. *United States*, 323 U.S. 588, 592, this Court said that adequacy of transportation relates only to the interest of the shipping public, whereas the expression "more efficient and more economic" transportation "may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found."

Indeed, with but one exception, every witness for the Milwaukee to whom the question was directed admitted that he had not, prior to the hearing, made a request for the Milwaukee routes to any railroad official or railroad rate bureau (R. 405, 425, 434, 453, 463, 475, 491, 515, 598, 609, 632, 638, 675, 682, 688, 706, 834–835, 948, 968, 1001, 1037, 1337). The one exception made an application for a rate and route which were approved, but the rate and route were not established because it appeared that there would be no movement (R. 2552). Many of the witnesses also admitted that their appearance was the result of the Milwaukee's solicitation (R. 441, 453, 463, 475, 492, 516, 528, 597, 609, 633, 675, 683, 688, 705, 818, 946, 968, 1001, and 1041). Moreover, shippers of lumber, grain, school, theater, and church furniture indicated that there is no need for the additional routes (R. 125–126, 129 and 131–132). In short, until inspired by the Milwaukee, there was little, if any, shipper demand for the establishment of additional through routes.

Since appellants do not contend that the Commission's report does not contain a fair summary of the evidence, we direct our attention primarily to the evidence as set forth in the report and particularly to evidence of shippers concerning the alleged need for additional routes on particular commodities. Such consideration clearly reveals a rational basis for the Commission's conclusion with respect to each category and, more important, demonstrates the validity of the Commission's determination that

there was no basis for requiring the establishment of through routes generally.

LUMBER AND FOREST PRODUCTS

Of the seven principal types of commodities involved here (lumber and forest products, grain, grain bins, fresh fruits and vegetables, furniture, agricultural implements, and livestock), the most important is eastbound shipments of forest products presently moving over unrestricted routes from SP&S System points to destinations beyond the Milwaukee and the Northern Lines, on which one of the Northern Lines serves as an intermediate carrier. (R. 120 and 780). Over the existing unrestricted routes, a large portion, traffic wise, of the Milwaukee's territory and points east of the eastern South Dakota State Line, can be served via the Twin Cities (Ex. 28, R. 1634—not printed). For example, a study of the Northern Lines' traffic revealed that less than 1% terminated at points west of the eastern boundary of South Dakota (Exhibit 123, R. 2805—not printed and 2789–2792). Although the Milwaukee handles eastbound shipments of lumber at the rate of 28,500 cars annually (R. 127 and 2882), it did not undertake to show how many of those cars find a market west of that line. If the experience of the Northern Lines is any standard, the demand is negligible.

In addition to the above unrestricted routes, there are routes (1) from SP&S System points, via Spokane and the Milwaukee, to Milwaukee local points and some common points and (2) from SP&S System points also served by the Union Pacific and Southern

Pacific via those roads through Ogden, Utah, El Paso, Texas, Marengo, Washington and numerous other junctions to the territory east of those points. The routes in (1) above do not permit diversion to points beyond the Milwaukee and the route in (2) above via Marengo is restricted so that stops in transit west of Marengo are not permitted by the Union Pacific or Southern Pacific. The destinations which can be reached via that route are confined to Milwaukee stations and to stations on connections of the Milwaukee north of its Omaha-Chicago line and north of the Ohio and Potomac Rivers reached via cross-lake routes (R. 139–140). Points along the Milwaukee also have available the unrestricted routes of that carrier from sources of supply in the Pacific Northwest. Thus, whatever may be the need of the so-called "pocket markets" at local points on the Milwaukee west of the eastern boundary of South Dakota, they can be amply supplied over the Milwaukee's unrestricted routes.

Against this impressive array of routes, the Milwaukee witnesses urged the establishment of a new unrestricted route via Spokane for several purposes. The gist of their testimony, similar to that in the *Rio Grande* case, *supra,* where the Commission likewise declined to establish additional through routes on lumber, is that the marketing of lumber and forest products from the Pacific Northwest requires flexible and liberal routing together with liberal transit privileges in order to compete freely in eastern and midwestern markets; that present restrictions on the Milwaukee routes discourage shippers from using those routes;

and that the establishment of unrestricted routing at competitive joint rates, particularly in connection with transit shipments,[17] is needed in the public interest. (R. 123–127).

The principal objections to the existing SP&S-Milwaukee routes via Spokane concern the lack of unrestricted privileges in connection with diversion, partial unloading, and partial loading. For example, a transit shipment over these routes cannot be diverted from a Milwaukee destination to a point on another railroad. But over the other routes, the transit operator can now ship from SP&S stations over the Northern Lines to the Twin Cities with full right to divert to points throughout the United States. The only portion of the territory served by the Milwaukee which cannot be served over that routing is the territory west of the eastern South Dakota line. Transit operators shipping from SP&S points which are also served by other carriers have still other routes available, as previously indicated.

---

[17] As explained in the Commission's report (R. 124), a "transit" shipment is one which is not sold prior to the billing from the point of origin. This type of shipment is to be distinguished from a "firm" order shipment for which a sale has been made to the ultimate receiver before the car is billed out of the origin point. The transit method of doing business, with its inevitable use of cars for storage purposes which aggravates the chronic car shortage problem in the Pacific Northwest, is referred to in the Commission's report (R. 127) and has had the attention of the courts. *Daugherty Lumber Co.* v. *United States*, 141 F. Supp. 576 (D. Ore.) and *United States* v. *Union Pacific R. Co.*, 173 F. Supp. 397 (S.D. Iowa), affirmed, 362 U.S. 327. Indeed, one of Milwaukee's witnesses stated: "* * * one of the amazing things about the transit company business" is the desire for slow routing (R. 737–738).

Moreover, transit operators who wish to have cars available along the Milwaukee to divert to or from stations west of the eastern South Dakota State line, where the demand is not significant, may do so by purchasing lumber produced at Milwaukee stations in the Pacific Northwest—now moving at the rate of 28,500 cars per year.

The other objections were no more substantial. The only specific testimony with respect to actual partial unloading en route at points west of the Twin Cities was introduced by the appellee railroads, not by the Milwaukee. As the Commission noted (R. 126), that information shows that in 1953 only 23 cars of forest products out of a total of 31,821 delivered by the SP&S to the Northern Lines were stopped for partial unloading at points west of the Twin Cities and that all 23 cars were fully unloaded at the Twin Cities or at points west thereof. While the Milwaukee had ample opportunity to show its experience on this type of service, it did not furnish such evidence and it therefore appears that the need for such privilege at points on its lines west of the eastern boundary of South Dakota is not more extensive than that shown for the Northern Lines.

The Commission stated that "a somewhat similar practice is shown for cars stopped to complete loading at points on the northern lines in 1953." Some of the Milwaukee's witnesses expressed the desire to move cars from SP&S System origins via Spokane, then via the Milwaukee in order to stop cars to complete loading at the mill of St. Maries Lumber Com-

pany. The testimony of one of these witnesses, on direct, is summarized in the Commission's report (R. 125), and has been dealt with rather fully in the preceding section of this brief (*supra,* pp. 49–51). As previously indicated, there are other rates and routes from most of SP&S System territory via the Union Pacific or the Southern Pacific to Marengo on which the privilege of partial loading at St. Maries exists. This route, together with the Milwaukee's own route from its source of supply in Washington, indicate the lack of need for a new route.

The evidence concerning the specific examples referred to by the Milwaukee at pages 80–81 of its brief did not require the Commission to find that additional routes are needed. For example, the witness for the retail lumber company with 18 yards in Wisconsin stated that the present needs of his company call largely for shipments in mixed cars, including particularly Idaho white pine such as is sold at St. Maries; that white pine available elsewhere is being received in declining quantities, necessitating new sources of supply; that under the joint rates sought this company could obtain lumber from SP&S origins with a stop-off at St. Maries, Idaho, to complete loading and then could move the car to one or more of the yards, including three on the Milwaukee and five on the Chicago North Western, at which joint rates on such shipments do not now apply. However, he has never done business at St. Maries (R. 803), even where the loading-in-transit privilege was available to him. Moreover, as previously noted in our discus-

sion in Point III of the situation at St. Maries, the practice of stopping for completion of loading east of Spokane is negligible. The other examples cited by Milwaukee show no greater need.

The Milwaukee asserts (Br. 85) that the needs of lumber shippers are "practically identical" to those of shippers of agricultural commodities for which the Commission prescribed through routes and joint rates in the *Rio Grande* case, *supra*. The brief then proceeds to quote a passage from the *Rio Grande* case relating to agricultural commodities. It fails to mention, however, that in the *Rio Grande* case the Commission declined to order through routes and joint rates on lumber upon testimony strikingly similar (287 I.C.C. at 646) to that presented here. If a comparison of the Commission's findings on evidence in different records were a sound basis for determining whether the evidence in the instant case is substantial, such comparison should be between similar commodities.

The Commission considered at length the testimony of shippers of lumber and forest products (R. 123–127, 139–140). The report indicates that careful consideration was given to the desire of the shippers for additional through routes and their claimed disadvantages resulting from the lack of more diversion and transit privileges. The Commission was not convinced, however, that the additional through routes sought were necessary or desirable in the public interest in order to provide adequate, and more efficient or more economic, transportation.

591863—61——5

This conclusion, similar to those involving the empirical process of rate making,[18] is one on which reasonable men may differ.[19] But, as this Court has indicated, the Act places the final responsibility for making that determination upon the Commission. So long as there is warrant in the record for that determination, it must stand.[20]

GRAIN

The policy of the carriers serving the Pacific Northwest of preserving their long hauls is also evidenced by their treatment of westbound shipments of corn moving through Spokane. Shipments out of Spokane (a storage point) are restricted—if the through rate is to apply—to the line which handled the inbound shipment. For example corn moving into Spokane via one of the Northern Lines may not be diverted to points on the Milwaukee and an inbound shipment via Milwaukee may not be diverted to points on one of the Northern Lines or on their subsidiary (R. 129).

There are already through routes on corn from Milwaukee origins to points on the SP&S via other junctions. The Milwaukee produced two witnesses who advocated the additional route via Spokane (R. 693–707 and 876–886). After quoting the Commission's summary of the testimony of these two wit-

[18] *Board of Trade* v. *United States*, 314 U.S. 534, 546.

[19] *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 512–513.

[20] *Ibid;* cf. *Denver & Rio Grande R. Co.* v. *United States*, 351 U.S. 321 at 334 and *Schaffer Transp. Co.* v. *United States* 355 U.S. 83, 86 fn. 3.

nesses, the Milwaukee indicates (Brief 86–87) that the additional route is needed for diversion purposes because "Generally, when corn is shipped from the origin point, the ultimate destination is not known." As one of the witnesses put it: "In other words I can make up my mind after the corn gets to Spokane rather than before, what I'm going to do with it" (R. 698).

The Milwaukee's witnesses failed to show that they were materially affected by the routing restrictions over existing routes and, as the Commission notes (R. 129), two other shippers (R. 1571–1585 and 1686–1693) testified that they had experienced no difficulty over the existing routes and saw no necessity for an additional route. Such testimony would not require the Commission to establish an additional route under the standards specified in Section 15 of the Act.

FRESH FRUITS AND VEGETABLES

The only witness (R. 652–677) who testified to the need of an additional route for shipments of fresh fruits and vegetables stated that an existing route over the SP&S and the Northern Pacific to Oakes, North Dakota, and then over the Northwestern to Aberdeen, South Dakota, did not provide frequent enough service between Oakes and Aberdeen; and that routing over the Great Northern was circuitous. The Commission pointed out, however, that there was another through route with joint rates from SP&S origins via Spokane, over the Northern Pacific to Jamestown, North Dakota, over the Midland Continental Railroad to Edgeley, South Dakota, and then

over the Milwaukee through Aberdeen to Mitchell and Sioux City, which was said to be as desirable as the route sought (R. 130). Although the Milwaukee now questions the desirability of this route (Brief 90), it does not claim that it made any attempt to rebut this evidence during the administrative hearing.

The Commission also observed that the production of fruits and vegetables at points served exclusively by the SP&S is insignificant compared to the total Oregon and Washington production (R. 140). The Milwaukee criticizes this statement as minimizing the importance of the fruit and vegetable supply in SP&S System territory (Brief 89). However, the record shows that the only commodity produced in any quantity on the SP&S is the potato crop along the Oregon Trunk in Central Oregon, served over joint trackage with the Union Pacific. Ninety-eight percent of this crop moves to Pacific Coast States and only two percent to transcontinental destinations. Oregon Trunk potatoes are not competitive ratewise with Idaho potatoes and with those from the Red River Valley in Minnesota and North Dakota which are on the market at the same time (R. 2568–2573 and Exh. 87 and 88, R. 2668—not printed).

FURNITURE

The only witness (R. 625–635, 1374–1381, 1441–1456) urging the establishment of an additional route for furniture was a distributor of school, theater and church equipment in the Pacific Northwest whose principal source of material is at Menominee, Michigan (R. 131 and 140). The basic argument of this

witness was that the additional route is necessary because it would enable him partially to unload at points on the Milwaukee and then deliver the balance to points on the SP&S. Besides the route via the Northern Lines to SP&S points, this shipper also has routes available which enable him to stop at Milwaukee local points in Montana and then forward over that carrier for complete unloading at points on the Southern Pacific and the Union Pacific in Oregon, many of which are also served by the SP&S System (R. 630–631). As the Commission indicates in its discussion of the evidence, a shipment by this company to an SP&S local point is a rarity (R. 131). Moreover, another witness for a manufacturer of similar equipment at Grand Rapids, Michigan, who makes shipments to the Pacific Northwest, testified that he has never experienced any difficulty in making stops in transit under the present rates and routes (R. 131–132).

IRON AND STEEL GRAIN BINS

The only witness who testified as to a need for a route for this commodity was the traffic manager of the Traffic Bureau of Sioux Falls, South Dakota, who referred to the difficulty encountered by one of his members—a manufacturer of grain bins located at Sioux Falls—who used existing routes under fabrication-in-transit privileges (R. 495–497). As the Commission indicates (R. 133), the shipper's difficulty is of his own choosing and arises from the fact that most of his inbound shipments of iron and steel are transported by the Milwaukee. While the Milwaukee

seems to argue (Brief 94) that the Commission misunderstood the nature of the route restrictions, it does not dispute the Commission's understanding that this shipper actually has available practical through routes to points on the SP&S (R. 2737–2738).

AGRICULTURAL IMPLEMENTS

The request for the establishment of an additional route for westbound shipments of agricultural implements was supported by a shipper who testified that such a route would be useful in permitting partial unloading and diversion privileges on shipments on the Milwaukee when the final destination is a point on the SP&S (R. 887–913).

This shipper can ship from all of his midwestern plants on joint through rates to SP&S System points via the road serving the plant to the Twin Cities, then via Great Northern or Northern Pacific to Spokane, and then via SP&S (R. 894). Likewise, from all of his plants, he can ship by the railroad serving the plant to Omaha, then by Union Pacific and Southern Pacific to all points on the Union Pacific and Southern Pacific in the States of Idaho, Oregon and Washington. From all points, he can ship on joint rates via the Milwaukee to Marengo, Washington, then by Union Pacific to reach all points on the Union Pacific and Southern Pacific in Oregon west of Marengo (R. 895). Over all the routes he may stop three times for partial unloading. The Commission considered those routes to be adequate (R. 132).

The Milwaukee's criticism of the Commission's finding is that (Brief 95):

> When a shipper must store goods without knowledge of where or on what railroad delivery will be made, or when it becomes necessary to change the final destination after the shipment is enroute, the need for a through route at competitive joint rates via the Milwaukee to reach any and all of the shipper's 26 dealers on the SP&S System becomes clear.

But the witness pointed to only one instance in which he had encountered difficulty in reaching a point on the SP&S and that difficulty was the result of an error in routing by some one in his own organization (R. 890–891 and 1933–1936).

LIVESTOCK

Sheep: The route and rate situation on eastbound shipments of sheep from SP&S points to Chicago is similar to those described above for other commodities. It reflects the policy of the northern transcontinental lines, including the Milwaukee, to retain the long hauls. Thus, a shipper on the Northern Pacific in Washington cannot ship east of Spokane via the Great Northern on a joint through rate to the East. Similarly, a shipper on the Great Northern in Washington cannot ship via Spokane on the Northern Pacific to the East. Likewise, shippers from Union Pacific points cannot ship via Spokane on the Milwaukee to on a joint through rate and a shipper from SP&S points cannot ship via Spokane on the Milwaukee to the East (R. 2746, 2748).

The evidence as to need of an SP&S-Milwaukee route via Spokane was primarily concerned with the

fact that shippers of sheep from SP&S points to Chicago, who desire to use the summer ranges along the Milwaukee, cannot do so at a rate comparable to that which they enjoy when shipping over existing routes and using the summer ranges along the Northern Lines. As the Commission indicates in its lengthy consideration of this commodity (R. 133–135), the evidence shows that there is much unused grazing land not only on the Milwaukee but also on the Northern Lines, and that the grazing-in-transit privilege has little to do with the selection by sheep raisers of the location of summer ranges (R. 134). The only sheep grower to testify stated that—because there are no joint through rates on lambs to Chicago via the SP&S to Spokane and east of Milwaukee, with the privilege to graze in transit along the Milwaukee—if he should ship over that route, the freight cost to Chicago would exceed by some $40 the freight cost over the existing routes via the Northern Lines (over which there are joint through rates with the privilege of grazing-in-transit) (R. 428–430).

A carload of sheep carries from 140 head single deck to 340 double deck (R. 1129). The average is 250 head, which was the figure given by the witness for a carload (R. 430). The $40 per car excess of freight amounts to 16 cents per head. While the record does not show the going price for lambs, it seems likely that a very small difference in the weight of a marketed lamb would more than absorb this difference of 16 cents. Thus, the $40 freight difference has nothing to do with the selection of summer range,

since the selection depends on which "will produce the heaviest lambs or the best lambs" (R. 1133).

Hogs: Contrary to the inference which the Milwaukee seeks to leave by its discussion of the westbound routes on hogs (Brief 99), the Commission did consider the subject (R. 135). The report indicates that through routes exist for the handling of this traffic from Sioux Falls, South Dakota, to Portland, Oregon and Seattle, Washington and that there are advantages—time of departure and length of time in transit—in shipping over each route. The witness testifying for the Milwaukee on this commodity relied solely on the possible superiority of the Milwaukee's service because of its train schedule—a superiority which was overcome when the Northern Pacific reduced its schedule by 24 hours on January 12, 1955 (R. 2319).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

ROBERT W. GINNANE,
General Counsel,

CHARLIE H. JOHNS, JR.,
Associate General Counsel,
Interstate Commerce Commission.

APRIL 1961.

APPENDIX

The following are the relevant provisions of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*):

§ 1(4). Duty to furnish transportation and establish through routes; division of joint rates.

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

* * * * *

§ 3(1). Undue preferences or prejudices prohibited.

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable

preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

§ 3(4). Interchange of traffic.

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

* * * * *

§ 15(3). Establishment of through routes, joint classifications, joint rates, fares, etc.

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without

complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

§ 15(4). Through routes to embrace entire length of railroad; temporary through routes.

In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith,

which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

U.S. GOVERNMENT PRINTING OFFICE: 1947